

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

ROBERT SPADA, ET. AL.,	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
FLEMING COMPANIES, INC.,	:	
ET. AL.,	:	
Defendants and Third	:	
Party Plaintiff,	:	
v.	:	
	:	CIVIL ACTION
BETTER FOODS	:	
DISTRIBUTORS, INC., ET. AL.,	:	NO. 02-0376
Third-Party Defendants.	:	

MEMORANDUM AND ORDER

Before the Court is Plaintiffs' motion for leave to amend the complaint to include direct claims against Third-Party Defendants Better Foods Distributors, Inc. ("Better Foods"). Defendants contest this motion because the addition of this party would destroy diversity and require that this matter be remanded to state court. For the reasons set forth below, I grant leave to amend the complaint to include Better Foods as an additional defendant and remand this action to the Court of Common Pleas of Philadelphia County.

On October 23, 2000, Plaintiff Robert Spada was employed as a truck driver when he allegedly sustained injuries when a box fell on him that had been loaded onto a trailer by Defendants Fleming for unloading at Better Food Distributors' Grover's Shop 'N' Bag store. Plaintiffs are citizens of Pennsylvania who brought suit in the Court of Common Pleas for Philadelphia County against Fleming Companies, Inc., Fleming Food East, Inc. and Fleming Companies, King of Prussia

("Fleming") alleging negligence and loss of consortium. Defendants removed this action to this Court on the basis of diversity jurisdiction as they are incorporated in Oklahoma with their principal place of business in Texas. Thereafter, Defendants asserted third-party claims against Better Foods for indemnification, contribution, and duty to insure and defend. Better Foods is a Pennsylvania Corporation with a principal place of business in Pennsylvania. Plaintiff now moves for leave to amend the complaint to assert claims directly against Better Foods.

I grant Plaintiffs' motion to amend. As a result, subject matter jurisdiction is no longer proper before this Court. Although counsel for the Fleming Defendants now alleges that there is federal question jurisdiction in this action by stating that Plaintiffs' Complaint involves interstate commerce governed by the Federal Motor Carrier Safety Regulation, 49 C.F.R. § 392.9, counsel failed to allege that this federal regulation is preemptive. Furthermore, the federal regulation alluded to by Defendant at best amounts to a defense to Plaintiffs' negligence claim and thus, does not amount to federal question jurisdiction. *See Louisville & Nashville Ry Co. v. Mottley*, 211 U.S. 149, 152 (1908) (holding that federal question jurisdiction cannot be based on an anticipated defense); *see also Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987) (holding removal is not proper if based on anticipated defense that is federal in nature). In light of the addition of Better Foods as a defendant, the parties are no longer diverse and there is no subject matter jurisdiction. Thus, I remand this action to the Court of Common Pleas for Philadelphia County. An appropriate order follows.

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ORDER

AND NOW, this day of **November, 2002**, upon consideration of Plaintiffs' motion to amend the complaint, the responses thereto, and the foregoing reasons, it is hereby **ORDERED** that:

1. Plaintiffs' Motion for Leave to Amend the Complaint (Document No. 18) is **GRANTED**. The Clerk of Court is directed to enter the Amended Complaint attached to Plaintiff's Motion for Leave to Amend on the docket.
2. This matter is **REMANDED** to the Court of Common Pleas of Philadelphia County without prejudice to the parties to assert any and all defenses as they deem appropriate.

BY THE COURT:

Berle M. Schiller, J.